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DATE: March 30, l995

CASE NO: 95-CAA-1

In the Matter of:

CLIFFORD SUTHERLAND,
SCOTT TENBRINK,
FRED E. FRANKLIN,
AND AARON HAHN,
Complainants,

v.

SPRAY SYSTEMS ENVIRONMENTAL
AND WILLIAM RAE SMITH,
Respondents.

Appearances:

Andrew L. Lichtenberg, Esq.
For the Complainants

Robert K. Jones, Esq.
For the Respondents

Before: DANIEL L. LELAND
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises from a joint complaint filed on September 13, 1994, by Clifford Sutherland, Scott Tenbrink, Aaron Hahn, and Fred Franklin ("Complainants") against their employer, Spray Systems Environmental, Inc., and its former employee, William Rae Smith ("Respondents"), alleging violations of the employee protection provisions of the Clean Air Act ("CAA") and the Toxic Substances Control Act ("TSCA"). Specifically, Complainants alleged that Respondents illegally fired them on July 27, 1994 for complying with state and federally mandated requirements for the asbestos removal project at the Hermosa Middle School in Farmington, New Mexico ("Hermosa Project").

In a letter dated October 13, 1994, the Wage and Hour Division of the Employment Standards Administration outlined its findings from an investigation. Adopting these findings, the District Director found that Complainants were engaging in protected activity under the CAA and TSCA, namely the refusal to perform certain preparatory work at the Hermosa Project.

Furthermore, the District Director found that Complainants suffered adverse action, specifically their termination on July 27, 1994, as a direct result of their involvement in the above protected activity. District Director, Norma Adams, required Respondent Spray Systems to reimburse Complainants for lost wages, costs incurred as a result of their unemployment, attorney fees and other reasonably incurred litigation costs. Additionally, the District Director required Respondent Spray Systems to purge Complainants' personnel records of any derogatory comments and to cease any future "blacklisting" of Complainants.

In a telegram dated October 19, 1994, Respondents requested a formal hearing in this case. Accordingly, a hearing was held before the undersigned on November 29, 1994 in Albuquerque, New Mexico.

Complainants' Position

Complainants assert that the evidence and testimony presented at the November 29, 1994 hearing substantially support the October 13, 1994 findings of the Department of Labor, Wage and Hour Division. Specifically, Complainants contend that Respondent Spray Systems fired them in reprisal for their refusal to follow the instructions of Field Supervisor, William Rae Smith, who required them to hazardously modify their plan for the containment work at the Hermosa project. As for Respondents' contentions that Complainants abandoned their jobs and displayed poor job performance, Complainants have responded that Respondents fired them and then prepared pretextual reasons of poor job performance to explain their adverse action. Complainants seek reimbursement for their lost wages, costs incurred as a result of their unemployment, attorney fees in the amount of $2,904.00 and other related costs in the amount of $571.93.

Respondents' Position

Respondents request that Complainants' claims be dismissed with prejudice, as Complainants failed to engage in any protected activity under either the TSCA or the CAA. Furthermore, Respondent Spray Systems denies taking any retaliatory action against Complainants. Specifically, Respondent contends that it legitimately discharged Complainants on the basis that Complainants left the job site without their supervisor's authorization in violation of company policy. Furthermore, Respondent maintains that Complainants suffered no compensable damages as a result of their termination. Respondent even suggests that Complainants intentionally left their jobs with Respondent to pursue higher paying employment opportunities with Respondent's competitors.

SUMMARY OF THE EVIDENCE

Respondent Spray Systems Environmental, Inc. is an asbestos abatement company which had a contract with the Farmington, New Mexico, School District to remove asbestos containing floor tile and mastic from the Hermosa Middle School in July 1994. Complainants, all employees of Respondent at the time, were assigned to work on the Hermosa Project under the supervision of Jeff Tenbrink.[1] TR 13.

The project was additionally supervised by respondent, William Rae Smith, an employee of Respondent, and Ronald Holtz, an independent expert consultant, who had been retained by the school district to oversee the entire project. TR 13. Although Tenbrink originally planned to use a "bead-blast" or "shot blast" method to remove the tile and mastic, Smith, upon his arrival at the project site, changed the removal process to a chemical method. TR 130. According to Smith, the chemical method only necessitated the use of a terminator machine along with the installation of one layer of 6 mil poly plastic (or "critical barrier") and four foot splash guards around the windows. TR 14, 94, 130.

According to the Construction Standard set forth by the Occupational Safety and Health Administration, a critical barrier is defined as "one or more layers of plastic sealed over all openings into a work area or any other similarly placed physical barrier sufficient to prevent airborne asbestos in a work area from migrating to an adjacent area." 29 C.F.R. 1926.658; TR 16.

Disagreeing with Smith, Complainants believed that Smith's proposed installation of criticals, specifically the single layer of 6 mil poly plastic around the windows, would not properly contain the airborne asbestos produced by the terminator machine. Based on their experience, Complainants felt that one layer of plastic was required around all air ducts, vents, trophy cases, water fountains, doors, and every other area from which airborne asbestos fibers could migrate. TR 15-16.

Believing that Smith's specifications for the critical barriers were unsafe and hazardous (especially to the children that would be entering the school in two weeks), Complainants each informed their supervisor, Jeff Tenbrink, that they felt uncomfortable about following Smith's instructions. TR 22, TR 57, TR 74, TR 91. Sutherland, the foreman of the project, asked Jeff Tenbrink to speak to Smith about his and the other

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[1] As of July 1994, Clifford Sutherland had been employed by Respondent for 17 months (TR 25); Scott Tenbrink had worked for Respondent for three weeks (TR 41); and Aaron Hahn and Fred Franklin had worked for Respondent for less than two months (TR 71 and 81).

Complainants' reluctance to perform the preparatory work according to Smith's specifications. TR 24. Frustrated and confused, Complainants waited in the parking lot while Jeff Tenbrink spoke with William Smith. TR 92. At the direction of Smith, Jeff Tenbrink returned to the parking lot and fired Complainants for insubordination. TR 188.

FINDINGS AND CONCLUSIONS

A. Whether Complainants engaged in "protected activity" pursuant to the CAA and/or the TSCA.

Respondents argue that Complainants not only did not engage in any "protected activity" but that their termination legitimately resulted from the abandonment of their jobs rather than as a retaliation for any "protected activity."

Both the Clean Air Act and the Toxic Substances Control Act contain employee protection provisions which serve to protect employees from any retaliation or discrimination resulting from "protected activity." Under both the CAA and the TSCA, an employee is protected if he:

> 1) Commences, or caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter; 2) testified or is about to testify in any such proceeding; or 3) assisted or participated, or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.

42 U.S.C. 7622(a)(1988); 15 U.S.C. 2622(a)(1988).

To establish a prima facie case, Complainants must show: 1) that they engaged in protected activity, 2) that they were subject to adverse action, and 3) that the employer was aware of the protected activity when it took the adverse action. Larry v. Detroit Edison Co., 86-ERA-32 (Sec'y June 28, 1991). Complainants must also present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. Accord Mackowiak v. University Nuclear Systems Inc., 735 F. 2d 1159, 1162 (9th Cir. 1984). Once Complainants have established their prima facie case, Respondent may rebut it by articulating a legitimate, non-discriminatory reason for any adverse action taken. The employees must then establish that the employer's proffered reason is not the true reason. Wagoner v. Technical Products, Inc., 87-TSC-4 (Sec'y Nov. 20, 1990); Johnson v. Old Dominion Security, 86-CAA-3 (Sec'y May 29, 1991).

In a whistleblower proceeding, a complainant must show that the underlying act or its implementing regulations are involved. Johnson, supra. In its complaint, Complainants have alleged

violations under both the CAA and the TSCA. The substance of the complaint determines whether Complainants' activity is protected under a particular statute. Aurich v. Consolidated Edison Co. of New York, Inc., 86-CAA-2 (Sec'y Apr. 23, 1987).

The Environmental Protection Agency has specifically regulated the manner in which asbestos is handled within workplaces, essentially to prevent the emissions of asbestos to the outside air. See 40 C.F.R. Chapter 61, Subpart M, §61.146 and §61.147 (1986). As Complainants' allegations focus on Respondents' containment of airborne asbestos, specifically its effect on the children attending the Hermosa School, I find that the CAA provides the appropriate protection to Complainants' activities. Aurich, supra.

Similarly, the TSCA seeks to prevent the unreasonable risk of injury to health and the environment. 15 U.S.C. §2601. In fact, the TSCA specifically mandates the installation of "asbestos containing-material in the Nation's schools in a safe and complete manner." 15 U.S.C. 2641(b)(1). Accordingly, Complainants' allegations clearly fall within the TSCA's intended coverage.

Before filing a complaint with the Secretary of Labor, Complainants made internal complaints to their foreman, Clifford Sutherland, and to their supervisor, Jeff Tenbrink. Properly following the chain of command, Complainants communicated through their supervisor who in turn complained to top management, William Rae Smith. Internal complaints are considered "protected activity" under both the whistleblowing provisions of the CAA and the TSCA. Poulos v. Ambassador Fuel Oil Co., Inc., 86-CAA-1 (Sec'y Apr. 27, 1987); Helmstetter v. Pacific Gas & Electric Co., 91-TSC-1 (Sec'y Jan. 13, 1993). Accordingly, Complainants have satisfied the first element of their prima facie case, the participation in "protected activity."

However, Respondents argue that they complied with the substantive provisions of both the CAA and the TSCA thus precluding any liability under the Acts. Upon a review of the evidence, I find that Complainants made a "good faith" and "reasonable" complaint of Respondents' unsafe removal procedures. Simpson v. Mine Safety and Health Review Commission, 842 F. 2d 453(D.C. Cir. 1988). Based upon their experience in the asbestos industry, Complainants reasonably believed that the use of a terminator machine would produce airborne asbestos therefore requiring full containment procedures.[2] As Complainants made a

[2]Although Aaron Hahn and Fred Franklin are relatively new to the asbestos industry (TR 71 and TR 81), Clifford Sutherland has worked in the asbestos removal industry for seven years (TR 12) and Scott Tenbrink for approximately six years (TR 41).

"good faith" complaint, Respondents cannot now escape liability based on a subsequent claim of compliance. Because of the complex and frequently contradictory testimony, I am unable to determine whether Respondents' asbestos abatement procedures complied with the CAA and the TSC. However, irrespective of whether Respondents actually violated the substantive provisions of the Acts, Complainants are afforded sufficient whistleblowing protection, as they "reasonably believed" that Respondents' actions were harmful and violative. Minard v. Nerco Delamar Co., 92-SWD-1 (Sec'y Jan 25, 1994). As the Secretary observed in Minard, a proceeding under the Solid Waste Disposal Act,

> an employee's reasonable belief that his employer is violating the Act may--depending on the particular facts of the case--be sufficient basis for a retaliation claim if the employer allegedly takes action against the employee because he expressed his belief, irrespective of after-the-fact determinations regarding the correctness of the employee's belief.

Here, as the Complainants' complaints were in good faith, reasonable, and not frivolous, they are entitled to protection for their actions under the Acts.

B. Whether Respondent unlawfully discriminated against Complainants.

The second criterion for a prima facie showing of discrimination, that Complainants suffered adverse employment action, is also met. Specifically, Respondent Spray Systems terminated Complainants on July 27, 1994.

The third criterion, awareness of the protected activity at the time of the adverse action, is clearly established by Complainants' testimony. All four Complainants testified that they informed their supervisor, Jeff Tenbrink, of their concerns regarding the proper removal procedures. TR 22, TR 57, TR 74, TR 91. Furthermore, Sutherland asked Jeff Tenbrink to convey his and the other Complainants' apprehensions to Smith. TR 24. Jeff Tenbrink's conversation with Smith clearly made respondents aware of Complainants' protected activity. I am persuaded by Complainants' testimony and find said testimony to be more credible than the contrary testimony of Smith. TR 132-133. Accordingly, I find that Smith knew of the protected activity at the time that he terminated Complainants.

Additionally, the record contains sufficient evidence to raise the inference that the protected activity was the likely reason for Respondents' adverse action. The proximate timing of the protected activity in relation to the adverse action may support an inference of causation. Johnson, supra. Here,

Complainants engaged in protected activity, namely communicating their concerns regarding the proper removal procedures through their supervisor, Jeff Tenbrink. Immediately following Jeff Tenbrink's conversation with Smith, Complainants were terminated. I find that the timing of these events raises an inference of causation. Mackowiak v. University Nuclear Systems, Inc., 735 F. 2d at 1162; Couty v. Dole, 886 F. 2d 147, 148 (8th Cir. 1989). Accordingly, I find that the Complainants have established a prima facie case of unlawful discrimination.

Respondents attempts to rebut Complainants' prima facie case by arguing that they did not terminate Complainants but rather that Complainants chose to leave their jobs.[3] According to company policy, "leaving the jobsite without proper authorization" constitutes employee misconduct.[4] RX 4,5,6. Respondents contend that Complainants' retreat into the parking lot qualified as an overt act of insubordination. RX 2.

Based on the evidence, I find that Complainants' retreat into the parking lot constituted neither an abandonment of their jobs nor an act of insubordination. Instead, Complainants' walk into the parking lot qualified as a legitimate refusal to perform the preparatory work according to Respondents' specifications. After informing their supervisor of their concerns, Complainants retreated into the parking lot to await further instructions as to how to properly proceed with the job.

In fact, Smith acknowledged the true reason for Complainants' walk into the parking lot, that Complainants were protesting his work instructions. Smith testified that he told Jeff Tenbrink that "if they (Complainants) decided to leave and not do things the way they were instructed, that they were going to have to be reprimanded and replaced." TR 134. Smith's blatant admission precludes Respondents from now offering the excuse of job abandonment or insubordination to explain its termination action. I find these excuses to be a mere pretext for Respondents' illegal discharge of Complainants. Accordingly, Respondents have failed to successfully rebut Complainants' prima

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[3] Additionally, Respondents have submitted a total of five employee warning notices signed and dated August 8, 1994, citing Complainants' failure to wear hard hats. RX 2. As all of these warning notices were completed subsequent to the termination date of July 27, 1994, the notices could not have effectively warned Complainants of any poor performance prior to their termination.

[4]Respondents offered post-hearing three signed statements by Complainants Scott Tenbrink, Fred Franklin, and Clifford Sutherland, acknowledging various examples of company misconduct. Said statements have been admitted post-hearing as Respondents' exhibits 4, 5, and 6 respectively.

facie case of discrimination.

RELIEF

Reinstatement, Lost Wages, and Front Pay

Once the Court determines that a violation has occurred, Complainants are entitled under the CAA and the TSCA to reinstatement and back pay. 42 U.S.C. §7622(b)(2)(B); 15 U.S.C. §2622(b)(2)(B).

Respondent Spray Systems is ordered to offer Complainants their former jobs or other comparable positions.[5] 42 U.S.C. §7622(b)(2)(B); 15 U.S.C. §2622(b)(2)(B); Johnson, supra. However, Complainants have indicated that they are not interested in resuming their previous positions with Respondent. Nonetheless, I find that according to the Acts, Complainants are entitled to the relief of reinstatement and should be given the opportunity to resume their jobs.

Additionally, Respondent Spray Systems is ordered to pay Complainants the total amount of back pay incurred from the date of termination until the date of reinstatement. Back pay is appropriately tolled when the unlawful discrimination is remedied. James v. Stocklam Valves and Fittings, 559 F. 2d 310, 358 (5th Cir. 1977). Generally, such unlawful discrimination is remedied upon a bona fide offer of reinstatement. Ford Motor Co. v. EEOC, 458 U.S. 219 (1983); Figgs v. Quick Fill Corp., 766 F. 2d 901 (5th Cir. 1985).

The appropriate method to compute the back pay award is to determine the compensation that Complainants would have earned had they continued under the employ of Respondent minus any amount earned by Complainants through alternative employment. Back pay should continue during the intervening period between the date of the hearing and the date of reinstatement. Johnson, supra.

Subsequent to their termination by Respondent, Complainants have sought and obtained alternative employment. On September 1, 1994, Clifford Sutherland began working part time (approximately 20 to 30 hours per week) as an asbestos abatement supervisor for Compliance Technologies, Inc. earning $15.00 an hour.[6] While employed with Respondent, Sutherland earned $12.00 an hour plus

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[5]I find no indication in the record that Respondent has already made a bona fide offer of reinstatement.

[6]Sutherland is to provide the Court within 30 days with an itemization of his earnings since his discharge by the Respondent so that a precise award of back pay can be determined.

$3.00 per diem on a forty hour a week basis. TR 38.

Fred Franklin found a job with Compliance Technology at the end of September, earning $13.81 an hour.[7] TR 87. Franklin earned $9.00 an hour plus $3.00 per diem while working for Respondent. TR 88.

On September 14, 1994, Scott Tenbrink started working full time for Systems Environmental, earning $13.81 an hour. As an employee of Respondent, Scott Tenbrink earned $15.00 an hour or $600 a week. TR 68.[8]

Also working for Systems Environmental, Aaron Hahn has earned $13.81 an hour since September 14, 1994. Under the employ of Respondent, Hahn earned $10.00 an hour. TR 76. Prior to working for Systems Environmental, Hahn worked for a bowling alley as a mechanic's helper. TR 75.[9]

Complainants' earnings made through interim employment should be appropriately offset from the total back pay awards. Johnson, supra.

Complainants are additionally entitled to interest on back pay. Payment of prejudgment interest is appropriately awarded on the total back pay amount. Wells v. Kansas Gas & Electric Co., 85-ERA-0022 (Sec'y Dec. March 21, 1990).

With regard to front pay, I do not find such an award to be appropriate in light of the evidence in this case. In certain circumstances, front pay may be awarded prospectively if reinstatement is impractical, impossible, or an inadequate remedy. For instance, reinstatement may not be feasible due to ongoing antagonism between a discriminated employee and the

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[7]It is assumed that Fred Franklin's employment with Compliance Technology Inc. is on a full time basis, as there is no evidence to the contrary. Franklin is to provide the Court within 30 days with the exact date that he began working for Compliance so that this date can be used to terminate his back pay award.

[8]Tenbrink is to provide the Court within 30 days with an itemization of his earnings since his discharge by the Respondent so that a precise award of back pay can be determined.

[9] As Aaron Hahn did not testify to the contrary, it is assumed that he is working on a full time basis for Systems Environmental. Hahn is to provide the Court within 30 days with an exact itemization of his earnings at the bowling alley, specifically his rate of pay and the total number of hours worked.

discriminating employer. However, in this case, I find no evidence to suggest any continued hostility between Complainants and Respondent Spray Systems which would prevent an amicable working relationship. Wildman v. Lerner Sores Corp., 771 F. 2d 605, 614-616 (1st Cir. 1985).

B. Blacklisting; Expunging of Employment Records

Although Complainants have not alleged any specific blacklisting activities taken against them, there was some testimony to suggest that one of the Complainants, Clifford Sutherland, was "blacklisted" in retaliation for his protected activity. Jeff Tenbrink testified that he has been given instructions by his managers not to hire Clifford Sutherland because of Sutherland's pending suit against Respondent. TR 193. However, there is no specific evidence to suggest that Respondent has engaged in any actual blacklisting against Sutherland.

In fact, Chris Boyles, owner of Spray Systems, has testified that neither he nor anyone under his employ has discussed the Complainants with any prospective employers. TR 121. Additionally, Respondents argue that Sutherland has suffered no actual injury, as he is currently working in the asbestos industry. Respondents' post-hearing brief, p. 9. Regardless, I find that effective enforcement of the CAA and the TSCA requires "a prophylactic rule prohibiting improper references to an employee's protected activity whether or not the employee has suffered damages or loss of employment opportunities as a result." Earwood v. Dart Container Corp., 93-STA-0016, (Sec'y Dec. December 7, 1994).

Although no specific blacklisting activity has been found, I order Respondent Spray Systems not to engage in any future blacklisting against Complainants. Additionally, I order Respondent to expunge Complainants' personnel records of any derogatory references or comments.

C. Attorney Fees and Costs

Complainants are entitled to any reasonably incurred costs and expenses. 42 U.S.C.§7622(b)(2)(B); 15 U.S.C.§2622(b)(2)(B). Complainants' counsel, Andrew Lichtenberg, Esq., has submitted an attorney fee request of $3,475.93, representing 26.4 hours of attorney time at $110.00 per hour plus $571.93 in other litigation related costs. Complainants' Closing Brief, exhibit A. Neither Respondents nor their counsel has objected to this fee request. In consideration of the quality of the representation, the nature of the issues involved, and the amount of money at stake, I find the total requested fees of $3,475.93 to be reasonable and appropriate.

RECOMMENDED ORDER

Spray Systems Environmental is ordered to:

1. Offer each Complainant reinstatement to his former or comparable position with all of the compensation, terms, conditions, and privileges of the Complainants' former employment;

2. Compensate Complainant Sutherland for back pay through the date upon which an offer of reinstatement is made at a weekly rate of $495.00 minus any interim earnings;

3. Compensate Complainant Tenbrink for back pay through the date upon which an offer of reinstatement is made at a weekly rate of $600.00 minus any interim earnings;

4. Compensate Complainant Franklin for back pay at a weekly rate of $375.00 through the date upon which Franklin obtained a higher paying job at Compliance Technology;

5. Compensate Complainant Hahn for back pay at a weekly rate of $400.00 through September 14, 1994, (minus the wages he earned while working at the bowling alley) at which time he obtained a higher paying job;

6. Pay interest on all back pay awards to be calculated pursuant to 26 U.S.C. §6621(1988)(rate for the underpayment of Federal income taxes);

7. Expunge the personnel records of each Complainant of any derogatory comments and refrain indefinitely from engaging in any future blacklisting activities;

8. Pay to Complainants' counsel, Andrew L. Lichtenberg, Esq., attorney fees in the amount of $2,904.00 and reimbursement for costs in the amount of $571.93.

SO ORDERED

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DANIEL L. LELAND
Administrative Law Judge

DLL:rh:mv
Pittsburgh, Pennsylvania